

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 10, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP782**

**Cir. Ct. No. 2009CV4883**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**SUNTRUST MORTGAGE, INC.,**

**PLAINTIFF-RESPONDENT,**

**V.**

**VICKI M. LANE,**

**DEFENDANT-APPELLANT,**

**JOHN DOE LANE AND FAIRWAY INDEPENDENT MORTGAGE CORP.,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Dane County:  
SHELLEY J. GAYLORD, Judge. *Affirmed.*

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Vicki Lane appeals a judgment dismissing her counterclaim against SunTrust Mortgage, Inc. We affirm.

¶2 This case started as a mortgage foreclosure action by SunTrust against homeowner Lane. Eventually, on summary judgment, the circuit court rejected Lane’s defense that foreclosure should be denied because SunTrust acted with unclean hands. Based on that decision, the court entered the foreclosure judgment. However, the court allowed Lane’s counterclaim against SunTrust for money damages under WIS. STAT. ch. 224 (2011-12)<sup>1</sup> to go to trial. After trial, the court dismissed that counterclaim. Lane now appeals and raises issues about both the foreclosure judgment and dismissal of the counterclaim.

¶3 SunTrust argues that Lane cannot appeal the foreclosure judgment because that was a final judgment from which the current appeal is not timely. We reject the argument because the foreclosure judgment was not final while a counterclaim remained pending. *See Republic Capital Bank, S.S.B. v. Luchini*, 153 Wis. 2d 656, 658, 451 N.W.2d 474 (Ct. App. 1989).

¶4 Turning to the substance of the appeal, Lane argues that SunTrust’s conduct in failing to give her a decision on her request for loan modification could reasonably be considered unclean hands, and therefore the circuit court erred by granting summary judgment that prevented a trial on this defense. In response, SunTrust argues that at the time of the summary judgment decision, Lane’s unclean hands argument was based on SunTrust conduct other than the loan modification conduct, and therefore she has forfeited the argument. In reply, Lane appears to concede that the loan modification conduct was not the basis for her defense at that time, and she asks that we remand “with the opportunity to plead

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the unclean hands at the summary judgment proceeding.” We usually do not address issues that are raised for the first time on appeal, *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52, and we see no reason to do so in this case, or to give Lane this late opportunity to expand her argument made on summary judgment.

¶5 Lane next argues, as she did before the circuit court, that SunTrust’s creation of the mortgage program under which Lane obtained her loan from mortgage broker Fairway constituted unclean hands because the loan was “doomed to fail,” and therefore the circuit court erred by granting summary judgment on that issue.

¶6 For a plaintiff in equity, such as a foreclosure plaintiff, to be denied relief under the clean hands doctrine, the defendant must show that the alleged conduct constituting unclean hands caused the harm from which the plaintiff seeks relief. *Timm v. Portage Cnty. Drainage Dist.*, 145 Wis. 2d 743, 752, 429 N.W.2d 512 (Ct. App. 1988). The general principle is that a plaintiff will be denied relief if it has been guilty of substantial misconduct regarding the matter in litigation, so that it has affected the equitable relations existing between the parties and arising out of the transaction. *Id.* at 753.

¶7 Lane argues that her loan was doomed to fail because it was an interest-only loan requiring 60% of Lane’s income to pay. For purposes of appeal, we assume that Lane’s factual description of the loan terms is correct. However, Lane does not persuade us that making such a loan is acting with unclean hands. Lane has not argued that the loan terms were unlawful in some way, or that she was not properly informed of the terms. Lane has not provided us a legal basis on which we can conclude that a lender is committing inequitable misconduct by

providing a borrower with a loan that has lawful terms, when the borrower is properly informed about the terms and then agrees to proceed with the loan.

¶8 Apart from her defense of unclean hands, Lane also argues that the court erred in dismissing, after trial, her counterclaim against SunTrust for money damages for violation of WIS. STAT. § 224.77(1)(m). That statute prohibits “improper ... dealing.” Lane argues that SunTrust’s slow processing of her loan modification request, and its failure to make a decision or to inform her of a decision on loan modification, were improper dealing. The circuit court concluded that SunTrust’s conduct in Lane’s case was “not good conduct,” but did not rise “to the level that was contemplated in Chapter 224,” because “it needs to be more egregious than that.”

¶9 We agree with the circuit court that the slow process and lack of a final response do not rise to the level of improper dealing. Not every episode of incompetence or internal institutional confusion amounts to improper dealing, and here Lane has not shown there was anything more than that. In addition, there is no indication that SunTrust itself benefitted in any significant way from its conduct. Finally, while it may be true that the loan modification staff never made a decision or gave Lane an answer, the fact is that Lane *did* receive an answer from SunTrust, as an institution, and that response was obviously a denial of loan modification, because the bank continued to pursue foreclosure.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

